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Supreme Court of the United States

OCTOBER TERM, 1949.

No. 154.

WONG YANG SUNG, *Petitioner,*

vs.

J. HOWARD MCGRATH, ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, UNITED STATES COMMISSIONER OF IMMIGRATION AND NATURALIZATION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF OF RISS & COMPANY, INC., AMICUS CURIAE.

PRELIMINARY STATEMENT.

Riss & Company, Inc. is a common carrier by motor vehicle in interstate commerce, holding extensive certificate authority for its operations from the Interstate Commerce Commission. The Company has secured the requisite consents of the parties to this proceeding to file this brief as amicus curiae.

This brief is filed because of the importance of the application of the adjudicatory provisions of the Administrative Procedure Act, 5 U.S.C. §§1004, 1006, 1007, to the proceedings of various administrative agencies and tribunals including the Interstate Commerce Commission.[1]

OPINIONS BELOW.

The *per curiam* opinion of the Court of Appeals (R. 8) is reported at 174 F. 2d 158. The opinion of the District Court is reported at 80 F. Supp. 235.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 4, 1949. The petition for a writ of certiorari was granted on October 10, 1949. Jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

The question considered in this brief is: Whether the hearing accorded an alien in a deportation case is a hearing "required by statute" within the meaning of Section 5 of the Administrative Procedure Act, 5 U.S.C. §1004.

STATUTES INVOLVED.

Sections 16 and 19 of the Immigration Act of February 5, 1917, as amended, 39 Stat. 885, 889, 8 U.S.C. §§152, 155, and Sections 4, 5, 7, 8, 10 and 11 of the Administrative Procedure Act of June 11, 1946, 60 Stat. 238-243, 5 U.S.C. §§1003, 1004, 1006, 1007, 1009, 1010, are set out in the Appendix to this brief *infra*, pp. 21-29.

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[1] An appeal is pending in the United States Court of Appeals for the District of Columbia Circuit in an action brought by Riss & Company, Inc., to require the Interstate Commerce Commission to comply with the provisions of Sections 5, 7 and 8 of the Administrative Procedure Act in proceedings under Section 207 of the Interstate Commerce Act, 49 U.S.C. §307 on application for certificate of public convenience and necessity. The District Court held (unreported decision) that these proceedings were not subject to Section 5 of the Act. See *Riss & Company, Inc.* v. *Interstate Commerce Commission, et al.* No. 10167.

STATEMENT.

Petitioner is a citizen of China who has resided in the United States since April 21, 1946. He was arrested in deportation proceedings on October 14, 1947, on a warrant issued the previous day. After hearings on December 11, 1947 and January 29, 1948, before a single Immigrant Inspector, his deportation was ordered on the charge that he had remained in the United States after legal admission for a period longer than permitted under the Immigration Laws. An appeal from the order of deportation was dismissed by the Board of Immigration Appeals on June 4, 1948.

A petition for *habeas corpus* filed on July 23, 1948, alleged that the hearing had not been conducted in conformity with the Administrative Procedure Act, 5 U.S.C. §§1004, 1010. On July 29, 1948, District Judge Holtzoff discharged the writ on the ground that deportation hearings were exempt from the Administrative Procedure Act under 5 U.S.C. §1006(a). On April 4, 1949, the United States Court of Appeals for the District of Columbia affirmed the decision of the District Court in a *per curiam* opinion.

SUMMARY OF ARGUMENT.

Sections 5, 7 and 8 of the Administrative Procedure Act are applicable to deportation proceedings of the Bureau of Immigration and Naturalization. Section 5 of the Administrative Procedure Act by its language covers every adjudication required by statute to be determined on the record after opportunity for agency hearing. The Immigration Act has long been held to require deportation proceedings to be determined on the record after opportunity for hearing. The argument made by respondents that the provisions of the Administrative Procedure Act relating to administrative adjudications are applicable only to those cases where the agency statute contains the word "hearing" cannot be supported in the light of the express terms

of the Act or its legislative history. The legislative history shows that it was the express purpose of Congress to apply Sections 5, 7 and 8 to all those administrative adjudications where a hearing is held before the administrative agency, and judicial review is limited to consideration of that proceeding. Indeed, a construction that Sections 5, 7 and 8 of the Act do not apply to such administrative proceedings as deportation would apparently grant to the alien a trial *de novo* by the courts. Moreover, such a construction would result in a sporadic and unequal application of the Administrative Procedure Act as between different agencies and destroy any uniformity in the application of its provisions.

ARGUMENT.

I.

The Importance of the Application of Section 5 of the Administrative Procedure Act, 5 U.S.C. § 1004.

The Court of Appeals and the District Court held that hearings in deportation proceedings were a "specified class of proceedings before officers specially provided for by or designated pursuant to statute" within the meaning of Section 7(a) of the Administrative Procedure Act. Both Courts apparently reached this conclusion because they construed Section 16 of the Immigration Act of February 5, 1917, 8 U.S.C. §152, as specially providing for deportation hearings to be held before Immigration Inspectors. It was concluded, therefore, that a deportation hearing need not be conducted by an examiner appointed and qualified under Section 11 of the Administrative Procedure Act. Accordingly, the hearings in this case were approved although held before an Immigration Inspector admittedly not separated from the investigative or prosecuting functions of the Immigration Service. The effect of Section 16 of the Immigration Act of 1917, and Section 7(a) of the Administrative Procedure Act is discussed at length in petitioner's brief and will not be discussed in this brief.

Respondents argue, however, an additional ground for sustaining the decision of the Court of Appeals based on a construction of Section 5 of the Administrative Procedure Act. Section 5 of the Act applies to administrative adjudications "required by statute to be determined on the record after opportunity for an agency hearing". They argue that deportation orders are not administrative adjudications required by statute to be determined on the record after opportunity for an agency hearing.

The argument rests upon the construction to be given to the phrase "required by statute" as used in Section 5. Respondents contend that this phrase literally limits the application of Section 5 to other statutes which, in terms, require a hearing. Thus, unless the statutory provision under which an administrative adjudication purports to be made contains the word "hearing", it is asserted that a hearing is not required by statute, irrespective of the judicial construction of such statute.

Respondents argue, therefore, that since a hearing on deportation is required only by necessary judicial construction of the Immigration Act and not by its literal phraseology, the provisions of the Administrative Procedure Act relating to adjudications are wholly inapplicable to deportation proceedings. On this ground, the construction to be given Section 7(a) of the Administrative Procedure Act is immaterial, since Section 7, relating to hearing officers and their powers, and Section 8, relating to agency decisions, are operative only if the administrative proceedings are subject to Section 5. Thus, it is argued that this Court may approve the use of Immigration Inspectors as hearing officers in deportation cases without regard to the construction to be given Section 7(a).

Section 5 of the Administrative Procedure Act is the keystone to the procedure specified in other sections regarding agency adjudications. If the adjudication is within Section 5 of the Act, the agency must comply with the procedure

detailed in Sections 5, 7 and 8. Where agency adjudications or rules are not required to be determined on the record after opportunity for an agency hearing, only the informal procedures specified in Sections 4 and 6 of the Administrative Procedure Act apply. Sections 4 and 6, unlike Sections 5, 7 and 8, do not provide for hearings before officers unconnected with the prosecuting or investigating functions of the agency, an opportunity to submit oral testimony or argument, decision on the record of the hearing, or other procedural rights given in Sections 5, 7 and 8 of the Act. Moreover, as will appear, Section 10 of the Administrative Procedure Act creates a substantial distinction in the extent of judicial review and in the functions of the reviewing court between proceedings subject to Section 5 and those where there is no statutory requirement for agency hearing. Section 10(e) (5) provides that, in any case reviewed on the record of a statutory administrative hearing, judicial review shall be limited to determining whether there is substantial evidence to support the decision of the agency. Section 10(e)(6), however, provides for a trial *de novo* of the facts in agency actions subject to judicial review where there is no statutory requirement of determination by the agency on the record of a hearing.

The Administrative Procedure Act thus creates a basic distinction between agency adjudications subject to Section 5 and those which are not. The distinction is important not only as to the type of hearing officer, but also as to the conduct of the hearing and the subsequent procedure in reaching an agency decision. It is present at every step in the adjudicatory process and in the extent and manner of judicial review.

In the present case, even though the hearing officer falls within the exception of 7(a) of the Act, there still remains the basic question of whether the alien is entitled to the other procedural safeguards given in Sections 5, 7 and 8 of the Act. Respondents contend that, in their view, these rights are not secured to the alien but that as a matter of

grace most of the procedures are followed. However, it is not denied by respondents that Section 5(c) of the Act, requiring separation of hearing officers from the prosecuting or investigative functions of the Immigration Service, has been ignored.

Riss & Company, Inc. submits that this argument by respondents, which was at least inferentially rejected by the Court of Appeals, cannot be sustained. The argument does violence to the plain terms of the Administrative Procedure Act and is in complete contradiction of the legislative history and expressed purposes of the Act. It is an argument which, if sustained by this Court, will vitally affect the application of the Administrative Procedure Act not only to deportation proceedings of the Immigration Service, but also to important proceedings of many other administrative agencies not now before this Court. For example, under the construction of Section 5, now advanced by respondents, the adjudication provisions of the Administrative Procedure Act would not apply to proceedings before the Interstate Commerce Commission involving applications for certificates of public convenience and necessity by interstate common carriers by motor vehicle,[2] or by common carriers by water,[3] or for the issuance of permits to contract carriers by motor vehicle,[4] or for the issuance of permits to contract carriers by water,[5] or for the issuance of permits authorizing operation as a freight forwarder,[6] or for the issuance of licenses authorizing operation as a broker of transportation.[7]

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[2] Part II Interstate Commerce Act §207; Act of August 9, 1935, 49 Stat. 551, 49 U.S.C. §307.

[3] Part III Interstate Commerce Act §309; Act of September 18, 1940, 54 Stat. 941, 49 U.S.C. §909.

[4] Part II Interstate Commerce Act §209; Act of August 9, 1935, 49 Stat. 552, as amended, 49 U.S.C. §309(b).

[5] Part III Interstate Commerce Act §309(g); Act of September 18, 1940, 54 Stat. 941, 49 U.S.C. §909(g).

[6] Part IV Interstate Commerce Act §410(c); Act of May 16, 1942, 56 Stat. 291, 49 U.S.C. §1010(c).

[7] Part II Interstate Commerce Act §211(b); Act of August 9, 1935, as amended, 54 Stat. 919, 49 U.S.C. §311(b).

The argument of respondents as to the construction of Section 5 is also important in the application of the Administrative Procedure Act to administrative rule making. Section 4 of the Act prescribes a general procedure of notice to interested parties and opportunity to participate through submission of written data, views or arguments. Section 4(b), like Section 5, however, provides that "where rules are required by statute to be determined on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply * * *"

II.

Section 5 Exempts Only Those Non-Statutory Hearings Granted as a Matter of Grace.

Although previous legislative proposals regarding administrative procedure had been made, the present Administrative Procedure Act may be traced to the work of the Attorney General's Committee on Administrative Procedure. This Committee, after exhaustively studying the administrative functions of the Federal Government, submitted its final report together with two minority reports. These reports show that the Committee members, both majority and minority, made no distinction between administrative adjudications where the relevant statutory authority of the agency, in terms, required a hearing, and those where the statute had been judicially construed to require a hearing. Indeed, both situations were treated equally and there was no attempt to identify or list the various statutes falling in either category. *Final Report of the Attorney General's Committee on Administrative Procedure* (1941), pp. 43-96. The reports, both majority and minority, show that most of the controversy centered around administrative adjudications. This was heightened in those cases where the Courts exercised only a limited scope of review and the decision of the agency was examined on the basis of substantial evidence in the record of

the agency hearing. *Final Report of the Attorney General's Committee on Administrative Procedure* (1941), pp. 78, 92, 208, 250.

An analysis of the legislative history demonstrates that the reference to "adjudication required by statute to be determined on the record after opportunity for agency hearing" in Section 5 was designed to eliminate only those matters of administrative routine and similar matters where a hearing traditionally or intentionally was not required. Moreover, it was understood by Congress that limiting Section 5 to cases where hearing was not required covered all formal adjudications except where existing law permitted a trial *de novo*. Section 5 was thus made applicable to those adjudications where the statute, in terms, or by necessary construction, required a hearing since the administrative hearing is the only opportunity afforded the parties to develop the facts of any particular case. This application of Section 5 is spelled out in detail in the legislative history of Section 5 and again in the legislative history of Section 10 relating to judicial review.

Section 10(e)(5) of the Act provides the standard of substantial evidence in judicially reviewing agency adjudications where the statute requires a hearing. Section 10(e)(6) provides that the standard of "unwarranted by the facts" will be applicable in a trial *de novo* in cases where the agency action is not required by statute to be made upon the record after opportunity for agency hearing. An opinion that there is no statutory requirement of a hearing within the meaning of the Administrative Procedure Act unless the statute, in terms, requires it, also raises the problem of a change in the long established mode of judicial review in those cases where the statute has necessarily been construed to require a hearing. *American Trucking Associations* v. *United States*, 326 U.S. 77; *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475. Only if the phrase, "required by statute," is read as including statutes which have been construed to require hearing can the Administrative Procedure Act be read as a harmonious whole and unreasonable results avoided.

It is evident from the statements during the debates and from the reports of the Committees that, if the statute does not require a hearing, then a trial *de novo* is available. Congressman Walter, Chairman, Sub-Committee of House Judiciary Committee, in charge of the bill in the House, during debate on Section 5, said:

> Section 5 relates to the judicial function of administrative agencies where they decide specific cases respecting compliance with existing law or redress under existing law. It applies, however, only where Congress by some other statute has prescribed that the agency shall act only upon a hearing and, even in that case, there are six exceptions. The requirements of section 5 are thus limited to cases in which statutes otherwise require a hearing because, where statutes do not require an agency hearing, the parties affected are entitled to try out the pertinent facts in court and hence there is no reason for prescribing informal administrative procedures beyond the requirements of section 6 * * * Sen. Doc. 248, 79th Cong., 2d Sess., p. 359.

Similarly in the Senate Judiciary Committee print of the bill, which contained explanatory remarks by the Committee, it is stated:

> Limiting application of the sections to those cases in which statutes require a hearing is particularly significant, because thereby are excluded the great mass of administrative routine as well as pensions, claims, and a variety of similar matters in which Congress has usually intentionally or traditionally refrained from requiring an administrative hearing * * * There should be no disposition to compel administrative hearings where Congress has not already so provided because, as pointed out below in connection with judicial review, the established law permits a trial *de novo* of the facts in all cases of adjudications where statutes do not require an administrative hearing. Sen. Doc. 248, 79th Cong., 2d Sess., p. 22.

In accordance with this basic purpose and intent, the Administrative Procedure Act in Section 10(e) provides in

categories (5) and (6) the standards of review of administrative action. Section 10(e)(5) provides "unsupported by substantial evidence *in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute*" (italics added) and Section 10(e)(6) provides "unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court." Category (5) was intended to restate the present standard of review where the hearing was held and record made before the agency. It is important to note, however, that the application of category (5) is limited to those cases where a hearing is required by the statute. The legislative history of these provisions shows that Congress intended that the phrase "required by statute" include all proceedings where a hearing was required to be held under the statute because if no hearing was required the parties were entitled to a trial *de novo* of the facts.

The operation of Section 10(e) is explained in the Senate Judiciary Committee Print, June 1945, as follows:

> The fifth category necessarily limits the substantial evidence rule to cases in which Congress has required an administrative hearing in which the administrative record may be made. Th sixth category expresses the correlative situation in which Congress has not provided by statute for an administrative hearing and consequently any relevant facts must be presented *de novo* to original courts of review * * * *It should be noted that the sixth category, in accordance with the established rule, would permit trial de novo to establish the relevant facts as to the applicability of any rule and as to the propriety of adjudications where there is no statutory administrative hearing.* (Italics added). Sen. Doc. 248, 79th Cong., 2d Sess., pp. 39, 40.

Similarly in the Report of the Senate Judiciary Committee on the bill, it is stated:

> The sixth category, respecting the establishment of facts upon trial *de novo*, would require the reviewing

court to determine the facts in any case of adjudication not subject to Sections 7 and 8.

Sen. Doc. 248, 79th Cong., 2d Sess., p. 214.

The Report of the House Committee on the Judiciary explains the effect of these provisions in detail, as follows:

> "Substantial evidence" means evidence which on the whole record is clearly substantial, plainly sufficient to support a finding or conclusion under the requirements of Section 7(c), and material to the issues . . .
>
> The sixth category, respecting the establishment of facts upon trial *de novo*, would require the reviewing court to determine the facts in any case of adjudication not subject to sections 7 and 8 or otherwise required to be reviewed exclusively on the record of a statutory agency hearing. . . . In short, where a rule or order is not required by statute to be made after opportunity for agency hearing and to be reviewed solely upon the record thereof, the facts pertinent to any relevant question of law must be tried and determined *de novo* by the reviewing court respecting either the validity or application of such rule or order—because facts necessary to the determination of any relevant question of law must be determined of record somewhere and, if Congress has not provided that an agency shall do so, then the record must be made in court. Sen. Doc. 248, 79th Cong., 2d Sess., pp. 279, 280.

A reading of these interrelated provisions of the Administrative Procedure Act thus demonstrates that the phrase "required by statute" included not only hearings provided by the express language of the statute but also where the statute had been construed to require a hearing. The narrow construction offered by respondents carries with it the presumption that the entire mode of judicial review in these important administrative proceedings is to be eliminated. Cases such as the issuance of certificates of public convenience and necessity by the Interstate Commerce Commission are to be tried *de novo* in the District Court. Such a radical departure from the accepted methods of review

is not necessary if the phrase "required by statute" is interpreted as Congress intended. A construction of Section 5 which includes those administrative adjudications, which are required, by construction of the statute as well as by its terms, to be determined on the record of a hearing, is consistent with this legislative purpose and avoids unreasonable results.

III.

"Required by Statute" Explained by House Committee Report.

An interpretation of "required by statute" in Section 5 of the Act as including hearings required by the statute either in express terms or by judicial interpretation is supported by the history of the same phrase used in Section 4 of the Act relating to administrative rule making.[8] A provision concerning rule making was inserted in the Act during consideration of S. 7 in the 79th Congress. This provision originally used the phrase "required by law". This phrase was changed by the House after S. 7 had been passed by the Senate to "required by statute" in order to conform to the language used in Section 5. The Senate subsequently passed the bill as amended by the House. The House Committee explained the effect of the change as follows:

> The change is made to conform to the language used in the introductory clause of section 5 respecting adjudications. A statute may, in terms, require a rule or order to be made upon the record of a hearing, *or in the usual case be interpreted as manifesting a Congressional intention so to require, and in either situation sections 7 and 8 would apply save as other exceptions are operative.* (Italics added.)
> Sen. Doc. 248, 79th Cong., 2d Sess., p. 285.

[8] Section 4(b) of the Administrative Procedure Act, 5 U.S.C. §1003(b) provides in part: "Where rules are required by statute to be determined on the record after opportunity for an agency hearing . . ."

The Committee therefore stated unequivocally its position that "required by statute" as used in Sections 4 and 5 of the Act included not only those cases where the statute in terms requires a hearing *but also those cases where the statute has been interpreted as requiring a hearing.* This is completely nullified by a holding that the Act applies only where the statute under which the administrative agency acts provides, in its terms, for a hearing.

This explanation by the House Judiciary Committee of the term "required by statute" as used in Sections 4 and 5 of the Administrative Procedure Act is particularly important in view of the arguments made by respondents in this Court and the Court below. It is asserted by respondents that the hearing afforded in a deportation case is required because of judicial construction of the Immigration Act in the application of customary concepts of due process. Thus, it was argued that the hearing in deportation is "required by law" rather than "required by statute". Respondents attempt to demonstrate that this distinction was recognized by Congress and embodied in Section 5 of the Administrative Procedure Act, notwithstanding the unequivocal statement to the contrary by the House Judiciary Committee. To do this, respondents rely upon statements made to, not by, a Congressional Committee some five years prior to the passage of the Administrative Procedure Act by Congress.[9] Thus, respondents rely upon the statements of the then Solicitor General and Commissioner of Immigration regarding S. 674, 77th Cong., 1st Sess. (1941), to the effect that the phrase "required by law" might be so broad as to force formal adjudicatory proceedings in those cases where the agency *ex gratia* afforded a hearing and that the provisions of the bill should be limited to instances where the matters are disposed of by formal hearing.[10] These

[9] Brief of Respondents in Court of Appeals 14-15.

[10] Solicitor General Biddle wrote: "In some cases certain agencies have *ex gratia* by regulations imposed upon themselves requirements of formal procedures through the applicable statute makes no such requirement. In order to exclude the possibility that such procedures come

statements, made years before the Act was passed, to a Congressional Committee, can hardly be decisive legislative history. Moreover, these excerpts do not establish that Congress recognized that the phrase "required by statute" would exclude a hearing required by judicial interpretation of the statute. The statements, however, do demonstrate that the administrative agencies were interested in the application of the adjudicatory provisions where formal hearing was necessary and not to instances where hearings were given as a matter of grace. The testimony of the Commissioner of Immigration shows that, at that time, the Immigration Service believed deportation proceedings should be subject to any administrative procedure statute and that its application to deportation proceedings would improve the system.[11]

Respondents also rely upon, for example, the statement in the Senate Judiciary Committee Print, June 1945, that:

> * * * The introductory clause removed from the operation of Sections 5, 7 and 8 all administrative

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within title III, the amendment is desirable." Senate Hearings on S. 674, 77th Cong., 1st Sess. 1941, p. 1456. The Commissioner of Immigration testified: "Now, when we come to Section 301. We think there ought to be some clarification of the first part of that section. As it now reads it provides that the section—that the act—the section of this title, as a matter of fact, 'shall be applicable to proceedings wherein rights, duties or other legal regulations are required by law to be determined after opportunity for hearing.'

"We think that that ought to be made more specific and that it ought to read something like this: That they shall apply 'only to proceedings wherein rights, duties or other legal relations are required by the constitution or statutes to be determined after opportunity for formal hearing, and if such a hearing be held, only upon the basis of a record made in the course of such hearing.'

"In other words, so that it would be clear that this statute would apply only to those matters of administrative function in our service, which are disposed of by formal hearing. This would mean exclusion cases and deportation cases." Senate Hearing on S. 674, 77th Cong., 1st Sess. 1941, p. 577.

[11] The Commissioner of Immigration testified: "Through section 301, it applies its hearing-commissioner system only to cases where by law formal procedures are now required. In other words, as we read it, its requirements apply only to deportation and exclusive cases . . . We think that the hearing-commissioner system would improve our present procedure to a considerable extent without stultifying the administration of the laws. . . ." Senate Hearing on S. 674, 77th Cong., 1st Sess., pp. 571, 575.

> procedures in which Congress has not required orders to be made upon a hearing.
>
> Sen. Doc. 248, 79th Cong., 2d Sess., p. 21.

To the same effect, see Sen. Doc. 248, 79th Cong., 2d Sess., pp. 28, 202, 260; 92 Cong. Rec. 2151-2152, 2155, 5649, 5651.

These citations likewise do not support an argument that Congress recognized a distinction between the phrase "required by statute" and "required by law." Nor do they establish that by using "required by statute", deportation proceedings were excluded from Section 5. The citations cannot stand for these propositions because at the same time identical language was used with regard to the phrase "required by law" which respondents concede includes deportation proceedings. For example, the same Senate Judiciary Committee Print in explaining the phrase "required by law" used in Section 4(b) states:

> As to that type of rules, moreover, it leaves agencies free to choose from the several common types of informal public rule making procedures * * * except where Congress has required that rules be issued only upon a hearing. In the latter case, the hearing and decision procedures of section 7 and 8 necessarily apply. Sen. Doc. 248, 79th Cong., 2d Sess., p. 19.

To the same effect on "required by law", see Sen. Doc. 248, 79th Cong., 2d Sess., pp. 76, 315. Manifestly such statements are not indicative of an intent to discriminate between hearings required by necessary judicial construction of the statute and those where the statute contains the word "hearing."

IV

Interpreting "Required by Statute" as Including Only the Requirements Found in the Terms of the Statute Results in an Unequal and Discriminatory Application of the Act.

Senator McCarran, in presenting the bill to the Senate, stated that in preparing the Administrative Procedure Act: ". . . the committee has followed the undeviating policy of dealing with types of functions as such and in no case dealing with administrative agencies by name * * * the committee feels that administrative operations should be treated as a whole, lest the neglect of some link should defeat the purposes of the bill." Sen. Doc. 248, 79th Cong., 2d Sess., p. 302.

Similarly the House Report on the Act states that: "The bill is meant to be operative 'across the board' in accordance with its terms, or not at all. Where one agency has been able to demonstrate that it should be exempted, all like agencies have been exempted in general terms. (See Sec. 2(a)). Where one agency has shown that some particular operation should be exempted from any particular requirement, the same function in all agencies has been exempted." Sen. Doc. 248, 79th Cong., 2d Sess., p. 250.

Uniform application of the Act's provisions to similar functions in different agencies and even within the same agency is completely destroyed by a holding that Section 5 is applicable only where the agency statute, in terms, requires a hearing. A few examples of the discriminatory effect of this interpretation are: Section 5 would apply to proceedings on applications for certificates of public convenience and necessity for the operation of aircraft,[12] to proceedings on applications for certificates of public convenience and necessity for operation of a radio station,[13] to the issuance of certificates of public convenience and

[12] Act of June 23, 1938, 52 Stat. 987, 49 U.S.C. §481(c).
[13] Act of June 19, 1934, 48 Stat. 1085, 47 U.S.C. §309.

necessity for the operation of gas pipe lines,[14] to proceedings for the registration of securities brokers,[15] to proceedings for the revocation of second class mail permits.[16] It would not, however, under this interpretation apply to proceedings for certificates of public convenience and necessity for the operation of a common carrier by motor vehicle,[17] or water,[18] or proceedings for permits for operation as a contract carrier by motor vehicle,[19] or by water,[20] or proceedings for permits authorizing operation as a broker of transportation,[21] or operation as a freight forwarder,[22] or to proceedings of the Post Office Department to bar use of the mails,[23] or to exclude obscene material from the mails.[24] In these cases where the Act would not apply, hearings are held by the agency concerned and the courts have held that, although not specified in the terms of the statute, the statutes require a hearing.[25]

It is thus apparent that, if Section 5 is applicable only where the statute in specific language requires it, it would not apply "across the board." The exemption afforded in Section 5 would not be on a functional basis but would rather depend on the magic presence of the word "hearing" in the specific section of the statute under which the agency acts. This implies an extraordinary discrimination in the intent and purpose of the Act. It assumes that it

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[14] Act of June 21, 1938, 52 Stat. 824, as amended. 15 U.S.C. §717 f.

[15] Act of June 6, 1934, as added June 25, 1938, 52 Stat. 1075, 15 U.S.C. §78 o.

[16] Act of March 3, 1901, 31 Stat. 1107, 39 U.S.C. §232.

[17] *Supra*, note 2.

[18] *Supra*, note 3.

[19] *Supra*, note 4.

[20] *Supra*, note 5.

[21] *Supra*, note 7.

[22] *Supra*, note 6.

[23] R.S. §3929, 39 U.S.C. §259.

[24] Act of March 3, 1873, 18 U.S.C. § 1461, *Walker* v. *Popenoe*, 80 U.S. App. D.C. 129, 149 F. 2d. 511.

[25] Interstate Commerce Commission certificate of license proceedings, *United States* v. *Pierce Auto Truck Lines*, 327 U.S. 515; *American Trucking Association* v. *United States*, 326 U.S. 77; Post Office Department use of fraud statute, *Pike* v. *Walker*, 73 App. D.C. 289, 121 F. 2d 37 and proceedings to bar obscene material, *Walker* v. *Popenoe*, 80 U.S. App. D.C. 129, 149 F. 2d 511.

was intended to deny application of the Act to the whole series of important administrative proceedings which the judiciary has repeatedly held, by construction of the statute, are required to be determined upon the record after opportunity for hearing and which are made by the agencies only upon a record of a hearing. If this had been the purpose, certainly the least that could have been done was to list examples of statutes which made, in their terms, no provision for hearing. But there is no such list and the legislative history including the reports of the Attorney General's Committee on Administrative Procedure shows that nothing was made available on this point.

Moreover, it should be noted that if the phrase were to be interpreted to mean only the terms of a statute, Congress could have used language to make this clear. It is significant in this aspect that in another section of the statute Congress did use additional language in order to limit the provisions to the express terms of the statute. Attention is called to Section 10(c) relating to reviewable agency action. In that instance Congress provided that "Except as otherwise *expressly required by statute*, agency action otherwise final shall be final for the purposes of this subsection . . ." (Emphasis supplied) Certainly it is a fair construction that if Congress had intended the interpretation now advanced by the respondents of "required by statute" in Section 5, similar language would have been used to accomplish the purpose.

Respondents attempt to explain the extraordinary result of applying the formal hearing procedures of the Administrative Procedure Act in proceedings for the revocation of a second class mailing permit and denying its application in proceedings for deportation on the ground that the administrative agencies might be uncertain as to proceedings covered by the Act, unless limited to those cases where the word "hearing" appears in the statute. It is urged that the agency cannot adequately prophesy whether hearings are required with only the requirements of due

process to guide it.[26] Of course, respondents could hardly entertain any doubt whether the Immigration Act requires a hearing to be given in a deportation proceeding or that the determination must be reached on the record of that hearing. *Japanese Immigrant Case*, 189 U.S. 86; *United States ex rel Vajtaver* v. *Commissioner of Immigration*, 273 U.S. 103; *Bridges* v. *Wixon*, 326 U.S. 135. Assuming that there are instances where the statute under which the agency takes action is silent as to a hearing and there is no judicial construction of its terms, the problem the agency faces is whether to give any hearing. The courts have long reversed agencies where they failed to decide correctly whether the statute required a hearing. The Administrative Procedure Act and Section 5 cannot complicate the problem of the agency or bring to bear a greater penalty if its decision is erroneous.

CONCLUSION

From the foregoing it is clear that Section 5 of the Administrative Procedure Act is applicable to cases of adjudication required either by the terms of the statute or by necessary judicial construction to be determined on the record after opportunity for agency hearing. Deportation proceedings have long been held to be adjudications required by construction of the Immigration Act to be determined on the record after opportunity for agency hearing. Accordingly, Sections 5, 7 and 8 of the Administrative Procedure Act are applicable to deportation proceedings save as other exemptions apply.

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[26] Brief of Respondents in the Court of Appeals, p. 17.

APPENDIX OF STATUTES

Section 16 of the Immigration Act of February 5, 1917, as amended, 39 Stat. 885, 8 U.S.C. 152 provides in part:

> . . . The inspection . . . of aliens, including those seeking admission or readmission to or the privilege of passing through or residing in the United States, and the examination of aliens arrested within the United States under this section, shall be conducted by immigrant inspectors, except as hereinafter provided in regard to boards of special inquiry . . . Said inspectors shall have the power to administer oaths and to take and consider evidence touching the right of any alien to enter, reenter, pass through, or reside in the United States, and, where such action may be necessary, to make a written record of such evidence.

Section 19 of the Immigration Act of February 5, 1917, as amended, 39 Stat. 889, 8 U.S.C. 155 provides in part:

> At any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this chapter . . . shall, upon the warrant of the Attorney General, be taken into custody and deported . . . In every case where any person is ordered deported from the United States under the provisions of this chapter, or of any law or treaty, the decision of the Attorney General shall be final.

Section 4 of the Administrative Procedure Act, Act of June 11, 1946, 60 Stat 238, 5 U.S.C. §1003 provides:

> Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—
>
> (a) Notice.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof

in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) Procedures—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) Effective Dates—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) Petitions—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

Section 5 of the Administrative Procedure Act, Act of June 11, 1946, 60 Stat. 237, 5 U.S.C. §1004, provides:

In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

(a) NOTICE.—Persons entitled to notice of any agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) PROCEDURE.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

(c) SEPERATION OF FUNCTIONS.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as au-

thorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

(d) DECLARATORY ORDERS.—The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

Section 7 of the Administrative Procedure Act, Act of June 11, 1946, 60 Stat. 241, 5 U.S.C. §1006, provides:

In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal

bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) HEARING POWERS.—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

(c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) RECORD.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests

on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

Section 8 of the Administrative Procedure Act, Act of June 11, 1946, 60 Stat. 242, 5 U.S.C. §1007 provides:

In cases in which a hearing is required to be conducted in conformity with section 7—

(a) ACTION BY SUBORDINATES.—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

(b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and con-

clusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tenative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Section 10 of the Administrative Procedure Act, Act of June 11, 1946, 60 Stat. 243, 5 U.S.C. §1009, provides:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence of inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or

ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutinal right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record

or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Section 11 of the Administrative Procedure Act, Act of June 11, 1946, 60 Stat. 244, 5 U.S.C. §1010 provides:

> Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended, and the provisions of section 9 of said Act, as amended, shall not be applicable. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected by the Commission from and with the consent of other agencies. For the purposes of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommended legislation, subpena witnesses or records, and pay witness fees as established for the United States courts.